

*United States Court of Appeals
for the Second Circuit*



**PETITION FOR
REHEARING**

76-1075

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1075

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PFS

UNITED STATES OF AMERICA

Appellee,

-against-

RALPH MIRIANI,

Appellant.

PETITION FOR REHEARING

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

EDWARD R. KORMAN,
Chief Assistant United States Attorney
(Of Counsel)



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RALPH MARIANI,

Defendant-Appellant.

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PETITION FOR REHEARING

The United States of America, by David G. Trager, United States Attorney for the Eastern District of New York, petitions for rehearing of an order entered on July 19, 1976, reversing the judgment of conviction and remanding the case for a new trial.

The appellant, Ralph Mariani, appealed from a judgment of conviction, entered in the United States District Court for the Eastern District of New York, (Platt, J.) convicting him of aiding and abetting an armed bank robbery in violation of Title 18, United States Code, Sections 2113(a) and (d) and 2. The judgement of conviction was reversed on the ground that evidence which was assumed to have been illegally seized from his automobile, was improperly used to impeach certain testimony given by the defendant on cross-examination.

There is presently pending a motion filed on August 2, 1976, for an extension of time, until August 16, 1976, in which to petition

for rehearing and to amend the mandate to require a hearing on the voluntariness of the search rather than a new trial.

REASONS FOR GRANTING THE PETITION

We respectfully submit that rehearing is warranted here because in applying the exclusionary rule to bar cross-examination of a defendant on areas directly relevant to his direct examination, the panel overlooked significant holdings of the Supreme Court and, of this Court, which clearly suggest that Agnello v. United States, 269 U.S. 20 (1925), upon which the panel relied, is no longer good law.

1. Only recently, in Stone v. Powell, ____ U.S. ____, 96 S. Ct. 3037, the Supreme Court, in commenting on the rationale for the exception to the exclusionary rule, which permits illegally seized evidence to be used for the purpose of cross-examination, observed (96 S. Ct. 3049):

"The same pragmatic analysis of the exclusionary rule's usefulness in a particular context was evident earlier in Walder v. United States, supra, where the Court permitted the Government to use unlawfully seized evidence to impeach the credibility of a defendant who had testified broadly in his own defense. The Court held, in effect, that the interests safeguarded by the exclusionary rule in that context were outweighed by the need to prevent perjury and to assure the integrity of the trial process. The judgment in Walder revealed most clearly that the policies behind the exclusionary rule are not absolute. Rather, they must be evaluated in light of competing policies. In that

case, the public interest in determination of truth at trial was deemed to outweigh the incremental contribution that might have been made to the protection of Fourth Amendment values by application of the rule."

We submit that in terms of this "pragmatic analysis", which has evolved since Agnello v. United States, 269 U.S. 20 (1925), there is no basis for the limitation which the panel opinion drew here. We do not believe that a defendant has any more right to lie on cross-examination in response to relevant questions relating to his guilt or innocence than he has on his direct examination. As the Supreme Court held in Oregon v. Hass, 420 U.S. 714, 722):

"We are, after all always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution."

Moreover, in this respect, we submit that Agnello v. United States, supra, is distinguishable from this case, because there the answer to the question put on cross examination was not directly pertinent to the issue of his guilt or innocence. Here, of course, the bullets found in the defendant's automobile were of the same caliber as the weapon carried by his accomplice and, of course, the automobile was parked on the same street on which the defendant and his accomplice were observed entering the car used to drive to the bank. The presence of these bullets in the car was certainly relevant to test the credibility of the defendant's claim that he had no idea that his co-defendant was planning a bank robbery and would not participate in any such venture. Indeed, the jury's

evident interest in this piece of evidence shows how pertinent it really was.

The panel opinion, it is submitted, also overlooked the plain language of the opinion of the Supreme Court in Harris v. New York, 401 U.S. 222 (1971) which is simply inconsistent with its holding. Thus, the panel opinion stated (Slip Op. 5061):

"In the instant case the connection between Mariani's statement that he wouldn't rob a bank and the fact that bullets were found in his car is far too tenuous to justify admission of this highly prejudicial evidence. That the jury considered the bullets as more than evidence bearing on Mariani's credibility is apparent from its attempts to determine whether the bullets found in Mariani's car would be suitable for Acevedo's gun. We cannot find that the erroneous admission of the bullets constituted harmless error in this case."

Yet in Harris v. New York, supra, the Supreme Court expressly held that the mere fact that illegally seized evidence bare directly on the guilt or innocence of the defendant, did not require its exclusion. Said the Chief Justice (401U.S. at 2225):

"It is true that Walder was impeached as to collateral matters included in his direct examination, whereas petitioner here was impeached as to testimony bearing more directly on the crimes charged. We are not persuaded that there is a difference in principle that warrants a result different from that reached by the Court in Walder."

Indeed, relying upon this very language another panel of this Court held that an earlier decision of this Court, United States v. Fox, 403 F.2d. 97 (C.A. 2, 1968), which reached a similar result to

that reached here, would no longer be followed. Thus, in United States ex rel. Walker v. Follette, 443 F.2d. 167 (C.A. 2, 1971), the court observed (443 F.2d. at 169-170):

"In United States v. Fox, 403 F.2d 97 (2d. Cir. 1968), defendant, indicted for interstate transportation of stolen goods, denied on cross-examination that he had told a story to government agents upon his arrest which was inconsistent with his testimony on the stand. The government was permitted to prove the inconsistent statement on rebuttal. The statement had been obtained by government agents without giving defendant the warnings required by Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed. 2d 694 (1966). This Court reversed the conviction, holding that the use of the illegally obtained evidence, even to contradict defendant's testimony, violated his constitutional rights.

In Walder, defendant's false testimony was given on direct examination. In Fox, it was elicited on cross. In Walder the testimony related to a collateral matter. In Fox, it arguably related to the crime in question. These distinctions are admittedly fine. Nevertheless, this court, while expressing no view as to the continued viability of Walder, was unwilling to extend the doctrine of that case beyond its precise facts."

The opinion in Walker then continued in language inconsistent with the holding here (443 F.2d 170):

"Since Fox was decided, and also since the district court's decision in the present case, the situation has changed. On February 24, 1961, the Supreme Court decided Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971). This decision revitalized Walder and eradicated the distinction which we drew in Fox. Defendant, on trial for selling heroin, on cross-examination denied, in substance, that upon his arrest he

had made a statement to the police which tended to implicate him in the crime. The statement had been made without benefit of Miranda warnings. The trial judge charged that the statement attributed to defendant could be considered by the jury but only in passing upon defendant's credibility. The Supreme Court affirmed defendant's conviction. It cited and quoted from Walder and refused to distinguish it on the ground that Walder involved a statement by defendant on direct examination on a collateral matter whereas in Harris, defendant's testimony was obtained on cross-examination and pertained to the very crime for which he was being tried."

Moreover, the significance of Harris on the continued validity of Agnello v. United States, supra, upon which the panel here relied, was also noted in an article particularly critical of Harris. Dershowitz and Ely, Harris v. New York; Some Anxious Observations on the Candor of the Emerging Nixon Majority, 80 Yale L.J. 1198. There Dershowitz and Ely observe (80 Yale L.J. at 1213):

"Harris, of course, is like Agnello rather than Walder, and Harris's conviction would clearly have been reversed had the earlier decision been followed. Accordingly, the Harris Court did not extend a general rule laid down in Walder to the facts in the case before it, as it suggested it was doing; instead, it squarely overruled the unanimous decision in Agnello without even citing it."

CONCLUSION

In sum, we submit that the panel should reconsider its holding reversing the judgement of conviction based on the authority we have cited and which, unfortunately, was not called to the attention of the panel in our brief.

Dated: August 16, 1976

Respectfully submitted,

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EASTERN DISTRICT OF NEW YORK

Edward R. Korman
Chief Assistant U.S. Attorney
(Of Counsel)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EDWARD R. KORMAN, being duly sworn, says that on the 16th day of August, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Petition for Rehearing of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Stephen Flamhaft, Esq.
32 Court Street
Brooklyn, N.Y. 11201

Sworn to before me this
16th day of August, 1976

MARTHA SCHAFER

MARTHA SCHAFER
Notary Public, State of New York

No. 24-3480350

Qualified in Kings County
Commission Expires March 30, 1977

Edward R. Korman
EDWARD R. KORMAN